

*United States Court of Appeals
for the Second Circuit*



**BRIEF FOR
APPELLANT**

76-7292

~~76-7450/7485~~

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United States Court of Appeals
FOR THE SECOND CIRCUIT

GEORGE ARTHUR, et al.,

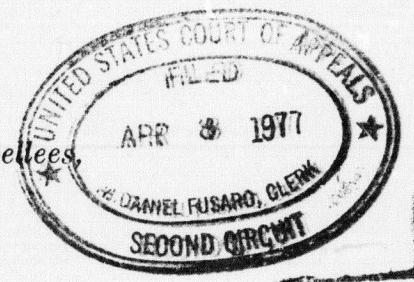
Plaintiffs-Appellees.

against

EWALD B. NYQUIST, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK



**BRIEF FOR EIGHT DEFENDANTS-APPELLANTS,
MEMBERS OF THE BOARD OF REGENTS
OF THE UNIVERSITY OF THE STATE OF NEW YORK**

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STATEMENT OF ISSUES PRESENTED

1. In determining the issue of segregative intent with respect to the Board of Regents, did the court below use the disproportionate racial impact test to the exclusion of any other standard for determining segregative intent?

The district court answered that question in the negative.

2. May a determination of segregative intent be predicated solely upon the foreseeable consequences test?

The district court appears to have answered that question in the affirmative.

3. Do the findings and the trial evidence in this case support a determination of invidious segregative intent by the Board of Regents?

The district court answered that question in the affirmative.

4. Where state education officials had adopted no plan or policy to violate the constitutional rights of the plaintiffs and where they did not authorize or approve of the violation by any city officials of plaintiffs' constitutional rights, does a decision of a federal court holding state officials liable for the violation of plaintiffs' rights constitute an unwarranted intrusion by the federal judiciary into the discretionary authority committed to state education officials by state law to perform their official functions?

The district court appears to have answered that question in the negative.

5. In light of the limitation of authority of the Board of Regents under state law to interfere with the quasi-judicial powers of the Commissioner of Education, did the regents commit acts of de jure segregation by omissions to act?

The district court apparently answered that question in the affirmative.

6. Can an intent to segregate be imputed to state officials elected subsequent to the acts or omissions alleged?

The court below apparently answered that question in the affirmative.

7. May a defendant be joined as a party to a lawsuit subsequent to the conclusion of trial, without being afforded the opportunity to reopen the trial proceedings, where joinder of such defendants was not predicated upon a substitution of named parties?

The court below answered that question in the affirmative.



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Martin C. Barell, Willard A. Genrich,
Emlyn I. Griffith, Joseph C. Indelicato, M.D.,
Mary Alice Kendall, Genevieve S. Klein,
William Jovanovich, and Louis E. Yavner.

STATEMENT OF THE CASE

This is an appeal by eight present and former * members of the Board of Regents of the University of the State of New York pursuant to 28 U.S.C. §1292(a) (1) from the following orders: order dated April 30, 1976, granting plaintiffs' motion to add the eight appellants herein, and others, as parties defendants to this action; order dated April 30, 1976, determining that appellants herein and other state and city officials violated plaintiffs' rights under the fourteenth amendment to the United States Constitution by creating, maintaining, permitting, condoning and perpetuating racially segregated schools in the City of Buffalo, and granting injunctive relief under 28 U.S.C. §2201; order dated July 9, 1976, insofar as it provides for the participation of the state defendants in an inter district remedy, and order dated March 1, 1977 pursuant to which the district court reaffirmed its liability decision of April 30, 1976.

The orders were rendered by Honorable John T. Curtin. The court's two decisions of April 30, 1976 are reported at 415 F. Supp. 904 (W.D.N.Y. 1976), and are reprinted in the Joint Appendix at pages 1019-1029 and 1030-1228. The court's decision of March 1, 1977 with respect to reconsideration of

*Appellants herein are Willard A. Genrich, Emlyn I. Griffith, Mary Alice Kendall, Louis E. Yavner, Martin C. Barell, William Jovanovich, Genevieve S. Klein and Joseph C. Indelicato, M.D. All of these appellants were members of the Board of Regents at the time of the decisions of the court below of April 30, 1976. Since the date of those decisions, William Jovanovich, Genevieve S. Klein and Joseph C. Indelicato, M.D., have ceased being Regents.

its liability decision of April 30, 1976, is reprinted in the Joint Appendix at pages 1305-1329. The pertinent pages of the court's decision of July 9, 1976 is reprinted at pages 1286A and B of the Joint Appendix.

Nature of the Case

The action was commenced on June 29, 1972 against Ewald P. Nyquist, Commissioner of Education; Joseph Manch, Superintendent of Schools of the City of Buffalo; the Board of Education of the City of Buffalo; and the Common Council of the City of Buffalo. Also named as a defendant was the Board of Regents of the State of New York, as an entity. No individual members of the Board of Regents, nor of the Buffalo Board of Education or City Council were named as defendants.

The complaint seeks declaratory and injunctive relief under 28 U.S.C. §2201, and claims jurisdiction of the court under 28 U.S.C. §1343. Plaintiffs allege a cause of action under 42 U.S.C. §1981 et seq., and the fourteenth amendment to the United States Constitution by reason of the alleged acts of the defendants in creating, maintaining, permitting, condoning and perpetuating racially segregated public schools in the City of Buffalo and in the Buffalo metropolitan area.

PRIOR PROCEEDINGS RELEVANT TO THE APPEAL
AND DECISIONS OF THE COURT BELOW

The trial of this non-jury case commenced on October 1, 1974 and concluded on October 23, 1974. Subsequently, the parties filed post-trial briefs, and closing arguments were heard on September 18 and 19, 1975. On April 8, 1976, plaintiffs moved for leave to file an amended complaint to add as named defendants each of the 15 members of the Board of Regents, including the eight appellants herein, in their individual and official capacities. The motion also sought leave to add certain individual city officials as defendants. (App. 1002).

By decision dated April 30, 1976, the court granted plaintiffs' motion to amend the complaint to add the individual Regents and others as party defendants. It should be noted that none of the individual Regents was represented by counsel at the time of plaintiffs' motion to amend the complaint nor prior to the court's decision of April 30, 1976. None of the eight appellants herein testified at trial. Regents Barell, Kendall and Yavner did not even hold office until after the conclusion of the trial. Regents Klein, Jovanovich, Griffith and Genrich did not assume office until after the complaint was filed. (App. 1232).

Also, on April 30, 1976, the court rendered a separate decision holding that all of the defendants, including appellants herein, had violated plaintiffs' fourteenth amendment rights by intentionally causing and maintaining a

segregated school system in Buffalo, New York. The court enjoined the defendants from taking any further action in violation of plaintiffs' constitutional rights and ordered the defendants to prepare plans to desegregate the Buffalo public school system. (App. 1030-1224).

By order dated June 10, 1976, following the notice of appearance of the undersigned as counsel for the eight individual Regent appellants herein, the court clarified its liability decision of April 30, 1976 by amending its order to provide that the individual Regents defendants and individual members of the Buffalo Board of Education were added to the lawsuit in their official capacities only. (App. 1225-6).

On June 16, 1976, a notice of motion for reconsideration and modification of the court's two decisions was filed on behalf of the eight individual Regent appellants herein. The seven other Regent appellants joined in the motion for reconsideration on June 21, 1976. (App. 1232).

Following hearings, on July 9, 1976 the district court entered an order setting forth initial steps to be taken by city and state appellants to integrate the Buffalo schools, which included provision for the State Department of Education to determine what suburban school resources may be used on a "voluntary or other" basis as part of the desegregation remedy. (App. 1286A and B).

On December 10, 1976, the court below filed its decision and order denying the motions of the individual Regents for reconsideration. The court's decision and order are reprinted in the Joint Appendix at pages 1287-1295.

On December 14, 1976, the court filed an order directing all parties to analyze and brief the impact of Washington v. Davis, 426 U.S. 229 (1976), and Austin Independent School District v. United States, ____ U.S. ____ 45 U.S.L.W. 3413 (December 7, 1976) on the court's liability decision of April 30, 1976.

On March 1, 1977, the court filed its decision and order reaffirming its liability decision of April 30, 1976 (App. 1305).

THE COURT'S FINDINGS CONCERNING
THE COMMISSIONER OF EDUCATION
AND THE BOARD OF REGENTS

In its decision of April 30, 1976, reported at 415 F. Supp. 904 (W.D.N.Y. 1976), the court below made the following findings with respect to the Commissioner of Education and the Board of Regents. (415 F. Supp. 949-959, App. 1135-1163).

The Regents Integration Policy

In 1960, the Board of Regents issued a policy statement urging desegregation of the New York State Public Schools. (PX 28, Pt II, at 11-12). In 1963, the Commissioner of Education issued a statement that de jure and de facto segregation is to be eliminated from the New York State schools. (Id. at 10-11). In 1969, a report prepared at the request of the Board of Regents and the Commissioner of Education continued to stress that de facto and de jure segregation should be eliminated from the New York schools. (Id. at 7)

The Commissioner's Orders to the
Buffalo Board of Education

In 1963, the then Commissioner requested all school boards in the State to advise the State Education Department of those

schools having a black enrollment exceeding 50%. The Education Department promulgated guide lines for desegregation which included the establishment of school attendance zones which would result in each school having a student body representing as near as possible a cross-section of the population of the entire school district. (PX 304, App. 1724). In 1964, several Buffalo parents took an appeal to the Commissioner of Education charging that the Buffalo school system was racially imbalanced. In a proceeding, known as the Yerby Dixon Appeal, the Commissioner of Education, in February 1965, held that the Buffalo school system was racially imbalanced and retained jurisdiction over the appeal pending the adoption by the Buffalo Board of Education of a plan to mitigate the problem of racial imbalance. Yerby Dixon Appeal, 4 Ed. Dept. Rep. 115, 117-18 (1965).

The plan submitted by the Board of Education was found by the Commissioner to be insufficient (PX 278, at 4). The Commissioner appointed a citizens committee to assist him on desegregation problems and the Buffalo Board requested the State Education Department to lend its help.

In August, 1966, the advisory committee submitted to the Board of Education a proposal drafted by the New York Center for Urban Education, which included the use of a middle

school concept to aid in the desegregation of the Buffalo schools. In September, 1966, the Commissioner of Education again ordered the Buffalo Board to submit a further plan for desegregating the Buffalo schools. A 16-point proposal was approved by the Buffalo Board and sent to the Commissioner in November 1966. The plan provided for the assignment to peripheral schools all pupils from the sixth to eighth grades of intercity schools.

In April, 1967, the Buffalo Board sent to the Commissioner proposals for implementing the November 1966 plan and recommended the establishment of Fillmore Jr. High as a demonstration middle school; the proposal that new middle schools be limited to one-third black membership, and that all middle schools be located in predominantly white areas of the city. The Board specifically stated that white students would not be transported to non-white neighborhoods.

This plan also failed to meet the Commissioner's approval as lacking specificity and devoid of a serious intent on the part of the Buffalo Board to significantly reduce racial imbalance. The Commissioner again ordered the Board to submit a detailed plan.

In January 1968 the Board produced a new plan detailing the results of desegregation efforts since 1965, which included the busing of 1200 intercity pupils to peripheral

schools. The central feature of the Board's 1968 plan was to restructure all public schools on a 6-4-4 basis. This would provide for pre-kindergarten to fourth grade to be located in neighborhood schools within walking distance. The fifth to eighth grades would be a series of converted and new middle schools to be situated in peripheral neighborhoods and be distributed so that their racial composition would reflect that of a school district as a whole. The ninth to twelfth grade would be in regular high schools. This plan became known as the 4-4-4 plan.

The Commissioner ordered the Buffalo Board to report to him by November 1968 upon actions taken to activate the proposals of the 1968 plan. In November, the Board detailed its efforts with respect to past integration, including the transportation of 2,000 intercity children and also reported difficulties in obtaining approval from the Common Council with respect to obtaining appropriations for middle school planning and the use of portable classrooms, both of which were central to the 1968 integration plan. In this connection, the Buffalo Board had agreed in May of 1968 to purchase 24 portable classrooms which would be placed in predominantly white schools to accommodate 450 minority pupils from predominantly black junior high schools. In response, the Buffalo Common Council enacted an ordinance which effectively

prohibited the use of portable classrooms. This resulted in litigation by the Board of Education which succeeded in having the ordinance declared unconstitutional. However, the portable classroom plan was delayed for at least one year. With respect to the Board of Education's proposed middle school program, the Common Council refused the necessary funding. In addition, city budget officials suspended a proposed plan to establish a new East Side high school which was designed for the purpose of relieving racial imbalance in that area of the city.

In June of 1969, the Commissioner of Education responded to the Buffalo Board's proposals of November 1968. The Commissioner noted that some progress had been made, but that segregation in the Buffalo schools had not been substantially alleviated. The Commissioner requested the Board to notify him within a month of its plans for that fall.

In August 1969, following the Buffalo Board's next report, the Commissioner noted that there was forward movement with respect to segregation in several respects, including the planned opening of an integrated middle school, the use of portable classrooms, and the expected increase of minority students to peripheral schools from 2,043 to 2,600. The Buffalo Board continued to file reports with the Commissioner outlining the progress it claimed to have made.

In January, 1972, the Commissioner wrote to the Buffalo Board noting that while the Board's reports showed some efforts had been made and success achieved, that the problem of racial imbalance in the Buffalo schools is still a long way from solution. The Commissioner suggested that a new integration approach should be used and ordered the Board to devise a plan which would integrate the early years as well as grades 5 through 8 and 9 through 12, although he did not completely rule out a 4-4-4 plan. The Commissioner gave the Board a little over two months to submit a plan under which every school would substantially reflect the racial composition of the entire district. The court below characterized this order as "stern and comprehensive". In response, the Buffalo Board voted to inform the Commissioner that it was unable to develop a desegregation plan, and went on record as being opposed to any type of forced busing. Instead, the Board voted to file its own staff's report, known as the Heck Report, recommending the conversion of certain middle class to achieve the Board's 4-4-4 plan and to integrate grades 1 through 4. The Buffalo Board took no action on this plan.

After the Board refused to develop the Commissioner's proposed desegregation plan, the Commissioner sent a State task force to Buffalo in May 1972 to develop a State plan for integrating the Buffalo school system. The State task force proposed two alternative plans, the first being the

Heck plan and the second being a modified version of the Heck plan, both of which were submitted to the Buffalo Board in November 1972 with a request that the Board respond by January 1973.

These plans were also rejected by the Buffalo Board and in August 1973 the Board's president wrote to the Deputy Commissioner of Education that if further proposed discussions between the Commissioner of Education and the Board would involve forced busing, there would be no point to such discussions. The Commissioner then had a show cause order drafted (PX 298). Such an order was a necessary prerequisite to the only two enforcement powers granted to the Commissioner under the New York Education Law - removal of school officers and the withholding of funds for wilfully disobeying an order of the Commissioner.

The show cause order was not issued prior to trial in October 1974. The Commissioner explained that he was incapacitated because of a heart attack at the time the show cause order was drafted.

STATEMENT OF FACTSThe Board of Regents

The Board of Regents is the governing body of the University of the State of New York and determines educational policies. Except as to the quasi-judicial role of the Commissioner of Education, the Board of Regents establishes rules for carrying into effect the laws and policies of the State relating to education. The jurisdiction of the Department of Education covers all education from pre-elementary school through colleges and universities. The Board also has jurisdiction over the professions, except for the law, including licensing and discipline.

Members of the Board of Regents are appointed by the State legislature by concurrent resolution. The Board is composed of fifteen members who serve without pay for a seven year term. They meet monthly, usually for three-day sessions. A journal is maintained of the official orders taken by the Board.

The Regents appoint the Commissioner of Education who serves at the pleasure of the Board. The Commissioner is the chief executive officer of the Department of Education. (Testimony of Joseph McGovern, former Chancellor of the Board of Regents. (App. 974-7, New York Education Law §101, 201, 202, 303, 310).

The Integration Policy of the
Board of Regents

In 1960, the Board of Regents promulgated their written policy on integration, which was that de facto and de jure segregation are to be eliminated from the schools of New York State. Similar policy statements, including methods suggested to integrate schools, were issued in 1968, 1969 and 1972. That policy has never changed. (McGovern, App. 14-18, PX 27, 28, DX 20, App. Nos. 27, 28, 179).

Commissioner Nyquist's Efforts to
Obtain Compliance by Buffalo with
the Regent's Integration Policy

The district court's findings concerning the efforts of the Commissioner to obtain integration in the Buffalo schools during the period 1963 to 1969 have been summarized at pages 7 to 11 of this brief and will not be repeated here. However, this Court is respectfully referred to Appendix III to the answers of the Commissioner to Plaintiffs' interrogatories which contain copies of correspondence between the Commissioner's office and the Buffalo Board

pertaining to the Commissioner's integration directives during that period. (DX 1, Appeal No. 160). Evidence pertaining to the period 1969 to trial, which supplements the court's findings is set forth as follows:

" In 1969, the State Legislature enacted Chapter 342 of the Laws of New York, amending Section 3201 of the State Education Law. That amendment prohibited state education officials from assigning students or establishing school districts, school zones or attendance units for the purpose of achieving racial balance in the schools. Mr. Nyquist testified that this law, which was passed shortly before he was elevated to Commissioner, in 1969, prevented him from taking effective action with respect to integration in the State until it was declared unconstitutional in 1971. (App. 783-4, 767).

Nevertheless, by letter dated June 18, 1969, Commissioner Nyquist wrote to the President of the Buffalo Board of Education pointing out that the anti-busing amendment passed in 1969 does not prohibit voluntary transfers of students for the purpose of integration (PX 272, App. 1680).* In that letter the Commissioner requested the Buffalo Board to report within a month on actions which would be taken in the 1969-70 school year. In response, the Buffalo Board instructed the Buffalo Superintendent of Schools to explore the possibility of cooperating with suburban school districts to achieve racial balance. Discussions were held with the suburban community of Williamsville, but nothing materialized. (Gardner, App. 320, 325-6). Mr. Nyquist testified that in February 1970, he attended a meeting in the suburban Williamsville district and approved a plan to transfer black students to the suburbs. (App. 765). However, the local school officials failed to follow through with this plan. (App. 325-6).

*Mr. Gardner, a former member of the Buffalo Board of Education, testified that the Commissioner had advised him that he disagreed with the anti-busing amendment. (App. 173).

With the cooperation of the State Department of Education, the Buffalo Board requested a report on integration to be prepared by an organization known as the Center for Urban Education. In March 1970, a report was prepared which proposed a plan for middle schools in the City of Buffalo primarily for the purpose of achieving integration (PX 270). No action was taken by the Board of Education with respect to that plan. (App. 290-1).

When the anti-busing amendment was ultimately declared unconstitutional, the Commissioner decided to involve the Buffalo Board and the community in discussions which would encourage the Buffalo Board to formulate its own integration plan. However, at that time, the Director of the Division of Intercultural Relations of the State Board, who was to become involved with the Buffalo Board and the community, had a heart attack and died. (Nyquist, App. 783-4).

The Commissioner then adopted a different approach to the Buffalo Board. By letter dated January 20, 1972 (PX 103, App. 1444), the Commissioner directed the Buffalo Board to submit to him by April 1, 1972, a desegregation plan for the schools in the Buffalo school system under which every school would substantially reflect the racial

composition of the entire district, and directed the Board to submit a progress report to him by February 15, 1972. (Gardner, App. 161-2).

At a meeting of the Board on February 1, 1972, the Commissioner's directive of January 20, 1972 was discussed. One member of the Board who believed that the Commissioner had exceeded his authority in using the directive, stated "I suggest that we treat the Commissioner respectfully but as an adversary". (PX 105A, App. 1458, Gardner, App. 166-7). By a four to three vote, the Buffalo Board passed a motion to advise the Commissioner that it could not comply with his request to submit a plan as outlined in his letter of January 20, 1972. The majority's position was that it was opposed to any form of forced busing. (Gardner, App. 180-1, 184).

In a further effort to persuade the Board of Education to take steps to integrate the Buffalo schools, the Commissioner came to Buffalo and met with the Buffalo Board. (Gardner, App. 174-5; Nyquist, 802). At the meeting, certain members of the Board expressed substantial resistance to any of the Commissioner's integration proposals. (Gardner, App. 198-9). At that meeting and on subsequent occasions, Commissioner indicated that his letter of January 20, 1972 should be considered a goal and that he would be willing to cooperate with

the Board to agree to a plan which would be workable. (Gardner, App. 483-4).

The Buffalo Superintendent of Schools, Dr. Manch, wrote to the Commissioner on March 23, 1972 that the Board would not submit an integration plan. (PX 108, App. 1483; Gardner, App. 185). After the Commissioner was advised of the Board's position, he directed members of his staff to go to Buffalo to prepare a State plan for integrating the Buffalo schools. In November, 1972, Dr. Grenda and other State educational officials prepared a report containing proposals and means of eliminating segregation in the Buffalo schools. That report was sent to the Board of Education with a request that the Board study it and communicate its comments to the Commissioner by January 1973. (Nyquist, App. 804-5, 267; PX 277, App. 1691).

In December 1972, the Buffalo Board voted to advise the Commissioner that the Grenda report did not constitute a basis for solving the integration problem and no action would be taken on it. (Gardner, App. 268, 335-6).

Early in 1973, Deputy Commissioner Sheldon requested the Buffalo Board to meet with him to further review the problem of segregation and the Board voted to advise Mr. Sheldon that, while it would be willing to meet with him as a matter of courtesy, if he intended to pursue an involuntary

busing program, there would be no point in such a meeting. Subsequently, a meeting was held between the Board and Dr. Sheldon and the Grenda plan proposed by the State Education Department was discussed, but no progress was made. (Gardner, App. 277-9; PX 6, App. 1332).

In September or October, 1973, Mr. Willard Genrich, one of the appellants herein, who was then a newly appointed member of the Board of Regents, met privately with Deputy Commissioner Sheldon and Dr. Gajewski, the then President of the Buffalo Board of Education. The purpose of the meeting was to explore possible means through which the Buffalo Board might achieve some movement on the integration question. (Gardner, App. 280-1).

Subsequently, in October or November 1973, Mr. Genrich and Dr. Sheldon met with the entire Board of Education and they requested the Board to reconsider its prior negative position and undertake affirmative steps to integrate the schools. Dr. Sheldon indicated that the Commissioner had gone about as far as he could possibly go and that in the near future he would be issuing a formal order directing an integration program. Mr. Genrich stressed the advisability of the Board of Education preparing its own program for integration. Dr. Sheldon stated that, while the Board of Education did not necessarily have to follow every part of the

Commissioner's directive of January 1972, the Board should adopt a program which would integrate the schools in a reasonable time and in a reasonable fashion. The meeting was unsuccessful and at times acrimonious, although Regent Genrich made efforts to control it. (Gardner, App. 281-5). There was another meeting between Dr. Sheldon and several members of the Board in early 1974. (Gardner, App. 286).

In April 1974, the Commissioner issued show cause orders which contained proposed desegregation plans for three other communities in New York State. Two additional show cause orders, including one for Buffalo, had been prepared at the time and were ready to be issued, when the Commissioner suffered a heart attack. He recovered in July 1974. By then, it would have been too late to issue an order which would have been applicable for the beginning of the school year in September 1974. (Nyquist, App. 784, 815, 781). Trial of this action commenced October 1, 1974.

When questioned by the court on the subject of the remedies the Commissioner could have invoked, Mr. Nyquist testified that as a matter of law, the only sanctions available to the Commissioner in the event a formal order is defied is to withhold State funds to the school district and to remove members of the local board of education. The issuing of the integration order and the issuance of sanctions

for failure to comply with such an order would have involved formal hearings. Judge Curtin volunteered that either of the sanctions would constitute "pretty drastic action". (Nyquist, App. 777, 811).

In response to the Court's question as to whether or not a middle ground was available, Commissioner Nyquist stated that he tried less drastic means in attempting to have the Buffalo Board carry out the policy of the Regents. This included persuasion, providing technical assistance and developing the State Board's own plan. The only other possible sanction, which theoretically might be available to the Commissioner, would be to seek a court order requiring enforcement of the Commissioner's order issued following a formal hearing, if that order were disobeyed. This type of remedy has never been sought in any case by the Department of Education. (Nyquist, App. 815).

**THE BASIS OF THE DISTRICT COURT'S
DETERMINATION OF INTENT**

The district court's conclusion that the Regents and Commissioner violated plaintiffs' constitutional rights was predicated solely upon the history of the Commissioner's efforts to require the Buffalo Board of Education to integrate the schools:

"A brief review of the decade following the Yerby Dixon Appeal delineates the culpability of the Regents and the Commissioner of Education, as well as that of the Common Council and the Board of Education." (415 F.Supp. p. 951) (1976)

The legal consequences of the unsuccessful efforts by the Commissioner to require or to convince the Buffalo Board of Education to successfully integrate the Buffalo schools was stated by the court below in its decision of April 30, 1976, as follows:

"But however much the Board of Education or the City Council procrastinated or wavered, an equal share of the blame for the segregation in the BPSS must be attributed to the State defendants. The Board of Regents and the Commissioner of Education have the central responsibility for education in New York State. They have the tools necessary to effectuate the integration policy they devised and to enforce the law they were clearly aware of. The state defendants shirked their responsibility under the laws of New York State and the Constitution, and in so doing encouraged the City defendants to continue their own segregative actions. They, like the City defendants, must be held accountable."

* * *

"The State defendants argue that "it is only required that they take reasonable steps to implement Regents' policy and to enforce the Commissioner's order of February 15, 1965 (Yerby Dixon). This they have done. (Post-trial Brief for State Defendants, at 15). Without considering whether the State defendants correctly interpret the law, this court is convinced that neither the Commissioner nor the Regents have taken 'reasonable steps' to alleviate the segregation in the BPSS. At the time this case was submitted for decision, ten and one-half years had elapsed since the 1965 Yerby Dixon Appeal and no significant improvement in desegregating the public schools in Buffalo had taken place. The Commissioner's actions over those ten years amount to a mountain of paper work with little substantive results. The lack of effective action by the Regents and by the Commissioner of Education has continued, and in some instances aggravated, racial segregation in the Buffalo public schools."

* * *

"Defendants have not met their burden of showing that the instances of segregation were not caused by their design or device."

* * *

"The State defendants' attempt to wash their hands of any involvement in the segregation that characterizes the BPSS, by claiming they have done all that is legally required of them, is similarly unpersuasive. Nothing could have encouraged the City defendants' procrastination and recalcitrance more than the lack of effective action by the State defendants. In the final analysis, the State defendants are entrusted with the authority over and responsibility for the educational system in New York State. They must be held accountable for their actions and omissions that allowed and encouraged the BPSS's increasingly severe segregation.

"Notwithstanding the culpability of the City and the State defendants, the court does acknowledge that some efforts by all defendants, evidencing

various degrees of support for desegregating the BPSS, were shown. Unfortunately, these efforts were too insignificant to alleviate the constitutional harm that had been done." (415 F.Supp. pp. 949, 959, 961; App. 1132, 1161-2, 1168-9)

The basis of the court's decision of March 1, 1977 on reconsideration with respect to the Regents was as follows:

"The Regents and the Commissioner, through their action in the early and mid-1960's, put the B.P.S.S. on notice that segregation must be remedied. Barring a lawsuit, if the Board of Education refused to act, only the Regents and the Commission could force their hand. Conversely, if the City officials were reluctant to act, as they proved to be, inaction by State officials could only encourage the City to continue its old ways. The Regents and the Commissioner were well aware of this. Nevertheless, alleging that they did not bring about the segregation in the B.P.S.S., the Regents and the Commissioner contend that their encouragement and requests that segregation be ended are sufficient to absolve them of liability. This reasoning is fallacious.

"In New York State, as this court has explained before, public education is the province of the State Department of Education, which is governed by the Regents and whose chief administrative officer is the Commissioner of Education. Commissioner Nyquist admitted at trial that only action by the Commissioner or by this court could accomplish desegregation of the B.P.S.S. The Regents must have been aware of this also. Certainly they knew that it was a rare day when a school district voluntarily integrated its schools. 415 F.Supp., at 951, n. 48. The Commissioner also testified at trial that the Board of Education's actions 'clearly and unequivocally violate the Regents policy.' 415 F.Supp. at 958.

"It may be, as the Regents and the Commissioner urge, that when state officials have been completely uninvolved with a school district, they should not

be held liable for segregation that exists in that school district. But here, the Regents and the Commissioner asserted their authority over the B.P.S.S. and demanded action. Their subsequent failure, over more than a decade's time, to require compliance with their directives served to continue and exacerbate the racial isolation in the Buffalo public schools. The court could only conclude from the Regents' and the Commissioner's actions over this extended time period that, contrary to the lip service they paid integration, they intended that the situation in Buffalo continue unabated. The Regents' continued reliance on their plethora of policy statements urging an end to school segregation is disingenuous. It hardly needs restating that actions speak louder than words." (App. 1323-5)

ARGUMENTPOINT IThe Court Below Used an Improper Standard
in Determining the Issue of Intent

It is respectfully submitted that the following analysis of the decision of the court below will demonstrate that its determination of constitutional violations by the Board of Regents and the Commissioner of Education was based upon an inference of segregative motive flowing solely from the impact of alleged omissions, which the United States Supreme Court has held to be an insufficient basis upon which to base a determination of "invidious segregative intent."

Village of Arlington Heights, et al v. Metropolitan Housing Development Corporation, et al, ____ U.S. ____ 45 U.S.L.W.

4073 (Jan. 11, 1977). The District Court inferred such intent from the fact that the Commissioner's efforts to require the Buffalo school system to integrate did not succeed.

In its decision of April 30, 1976, the court below held that under Hart v. Community School Board, 512 F.2d 37 (2d Cir. 1975), it was not necessary for plaintiffs to show that racist motives prompted the defendants, nor that defendants wanted the schools to be segregated:

"In deciding the question of intent, the court is not required to find guilt or innocence, prejudice or even-handedness, or even 'badness' or 'goodness' on the part of the defendants. To prove their case, plaintiffs are not required to show that racist motives prompted the defendants, nor even that defendants wanted the schools to be segregated, although proof of either of these would be sufficient to show the required intent." (415 F.S. at pp. 912-13; App. 1044).

In its decision on reconsideration dated March 1, 1977,

after reviewing three subsequent decisions of the United States Supreme Court, the District Court noted at footnote 4, with respect to the above quotation:

"To the extent that this misstates the law on intent after Washington v. Davis and Arlington, supra, the court stands corrected. However, the court believes that although it may have overstated the law in this particular paragraph, the findings on intent which the court reviews, infra, are based on a more narrow standard." (App. 1328-29).

The "more narrow standard" to which the Court refers in the above quotation appears to be a modification by the District Court of the "reasonable and foreseeable consequences" test of segregative intent enunciated by this Court in Hart v. Community School Board, 512 F.2d 37 (2d Cir. 1975). In this connection the Court below stated in its decision of March 1, 1977, on reconsideration:

"To the extent that the Hart standard suggested that mere cause and effect, mere analysis by way of a 'reasonable and foreseeable consequences' test which amounts to a finding that disproportionate impact is sufficient to impose liability for school segregation under the fourteenth amendment, it is refuted by Washington v. Davis and Arlington. This apparently is what the Supreme Court thought might have happened in Austin II. But this court does not read either Washington v. Davis or Arlington to prohibit the use of the foreseeable consequences test to analyze circumstantial evidence in evaluating the intent of defendants in school cases. At a minimum, "[t]he impact of the official action - whether it 'bears more heavily on one race than another,' Washington v. Davis, 426 U.S. at 242 - may provide an important starting point." Arlington, supra, 45 U.S.L.W. at 4077." (App. 1317)

It is respectfully submitted that the standard of intent actually adopted by the court below with respect to the Board of Regents was improper in the following respects:

1. Functionally, the court relied solely upon the racially disproportionate impact test which has been rejected by the U.S. Supreme Court as a sole standard upon which a finding of segregative intent may be predicted. Washington v. Davis, 426 U.S. 229 (1976); Village of Arlington Heights, et al. v. Metropolitan Housing Development Corp., et al., U.S. ____ 45 U.S.L.W. 4073 (Jan. 11, 1977).

2. Assuming, arguendo, that the District Court used a standard other than the impact test, the sole standard employed was the foreseeable consequences test which the Supreme Court has also held to be only a factor, insufficient in and of itself upon which a determination of segregative intent may be predicated. Austin Independent School District v. U.S., U.S. ___, 45 U.S.L.W. 3413 (Dec. 7, 1976).

At Point II of this brief, it will be shown that neither the District Court's findings nor the trial evidence can sustain a determination of invidious segregative intent on the part of the Board of Regents under any standard permitted pursuant to the recent decisions of the U.S. Supreme Court. The holdings of those decisions are reviewed as follows:

In Washington v. Davis, 426 U.S. 229 (1976), the Supreme Court held that the use by the District of Columbia Police Department of a written personnel test in conjunction with the hiring of prospective police recruits does not discriminate against black applicants simply because the test excludes a disproportionately high number of black applicants. The Court held that a constitutional violation may not be

found solely on the basis of the effect or impact of a law or government act. There must be established an actual motive or intent to segregate.

In Austin Independent School District v. United States, ___ U.S. ___ 45 U.S.L.W. 3413 (Dec. 7, 1976), the Supreme Court, Per Curiam, vacated a judgment of the United States Circuit Court of Appeals for the Fifth Circuit (reported at 532 F. 2d 380 (1976)).

In Austin, the Fifth Circuit had held that the assignment of Mexican American and Black students to neighborhood schools, which resulted in an ethnically-segregated school system, constituted a Constitutional violation. In so holding, the court adopted the "probable and foreseeable consequences" test in finding segregative intent, concluding that the segregated school system of Austin, Texas was the foreseeable and inevitable result of the neighborhood assignment policy. Significantly, the Court of Appeals cited Hart v. Community School Board of Education, supra, in applying the 'foreseeable consequence' rule. (532 F. 2d 389 Footnotes 6 and 7).

Contrary to the apparent interpretation of Austin by the court below in its decision of March 1, 1977, the Supreme Court's remand was not predicated upon the assumption that the Fifth Circuit may have relied solely upon the impact test without any consideration of whether or not the defendants had an actual segregative intent. The holding of the

Circuit Court of Appeals in Austin was that it was foreseeable by the school authorities that by adopting a neighborhood school assignment policy in segregated neighborhoods, the schools to which the children were assigned would be segregated. The Circuit Court's opinion renders it clear that the foreseeable consequences standard was used to find an actual intent to segregate, and that it was not deciding that impact, without intent, was the basis for its determination that the defendants had violated plaintiff's constitutional rights:

"Segregative actions taken with segregative intent. It has been the AISD's policy to assign students to the schools closest to their homes. The City of Austin, with the exception of the strip between East and West Austin, has ethnically segregated housing patterns. Hence, the natural, foreseeable, and inevitable result of the AISD's student assignment policy has been segregated schools throughout most of the city. Moreover, as we found in Austin I, "[a]ffirmative action to the contrary would have resulted in desegregation". 467 F.2d at 863. The inference is inescapable: the AISD has intended, by its continued use of the neighborhood assignment policy, to maintain segregated schools in East and West Austin. The plaintiffs have therefore established a prima facie case of de jure segregation of Mexican-Americans in all portions of the school district except the residentially integrated central city area." (532 F.2d at p. 390, emphasis added)

Thus, it can be seen that in light of the Supreme Court's remand of Austin, neither the foreseeable consequences nor the disproportionate impact test are, without additional evidence of intent, sufficient standards upon which to

to predicate a finding of invidious segregative motive or purpose. This is further substantiated by the Supreme Court's decision in Arlington.

In Arlington, the plaintiffs alleged that the refusal of the defendant Village to rezone a 15 acre parcel of land from single-family to multiple-family classification was racially discriminatory and violated plaintiffs' Fourteenth Amendment rights. It was found that the Arlington area was enjoying rapid growth in employment opportunities and population, but it continued to exhibit a high degree of residential segregation. The plaintiffs sought to build housing which would have brought additional minority citizens to the area.

The Supreme Court stated in Arlington:

"The (Circuit) Court held that Arlington could not simply ignore this problem. Indeed, it found that the Village had been 'exploiting' the situation by allowing itself to become a nearly all-white community."

* * * *

"Against this background, the Court of Appeals ruled that the denial of the Lincoln Green proposal had racially discriminatory effects and could be tolerated only if it served compelling interests." (45 U.S.L.W. 4075-6).

Although it was foreseeable that the inaction of the Village to rezone would result in continued housing segregation, the Supreme Court reversed holding that the plaintiffs had failed to carry their burden of proving that a discriminatory purpose had motivated the Village in denying the request for zoning.

The Supreme Court in Arlington held that in determining the issue of intent, the impact of an official action can only be considered a starting point, and other factors must be considered unless there emerges a stark pattern, unexplainable grounds other than race. These factors and their application to the facts in the instant case will be discussed in Point II of this brief.

A review of the decision of the court below of April 30, 1976 and March 1, 1977 reveals that its determination of intent with respect to the Regents was based solely upon the impact test. The following summarizes those findings concerning the Regents.

Beginning in 1960, the Board of Regents issued strong statements that de facto and de jure segregation should be eliminated from the schools of New York State. The State Commissioner of Education demanded that the Buffalo school system eliminate segregation in its schools and efforts were made by the Commissioner thereafter to require and convince the Buffalo Board of Education to remedy segregation. However, the Commissioner's efforts were unsuccessful. The court below stated in its decision of March 1, 1977.

"It may be, as the Regents and the Commissioner urge, that when state officials have been completely unininvolved with a school district, they should not be held liable for segregation that exists in that school district. But here, the Regents and the Commissioner asserted their authority over the B.P.S.S. and demanded action." (App. 1324-25).

It was only because of the Commissioner's failure to act more forcefully to require compliance with his integration demands that the court drew the following inference in its decision of March 1, 1977:

"The court could only conclude from the Regents' and the Commissioner's actions over this extended time period that, contrary to the lip service they paid integration, they intended that the situation in Buffalo continue unabated." (App. 1325).

The court's reasoning is not only logically unsound, and contrary to the overwhelming weight of the evidence, but renders it clear that its determination was based solely upon the impact test rejected by Washington v. Davis and Arlington. In Arlington, the Circuit Court of Appeals held that the Village was aware of the high degree of residential segregation in the area, and therefore it should have granted the zoning request which would have alleviated the segregation problem. In the instant case, the court held that even though they made affirmative efforts, the Commissioner and the Regents should have taken further steps to require the Buffalo City authorities to desegregate the Buffalo schools, and if they had done so, segregation would have been eliminated. In both cases, impact was the touchstone of the determinations, whether or not the impact was foreseeable.

Even if the district court's ruling on intent can be deemed to be based upon the foreseeable consequences standard, a decision based solely on that standard cannot be sustained in view of Austin. In Austin, the Circuit Court held that it was foreseeable that the assignment of children in segregated neighborhoods to neighborhood schools would result in school segregation. As discussed above, even though the Circuit Court used the foreseeable consequences test to find actual intent, the Supreme Court remanded. In the instant case, at most, the decision of the District Court can be viewed as being predicated on the finding that it was foreseeable that if the Commissioner of Education did not act more forceably, the Buffalo school system would remain segregated. With respect to the Board of Regents, the decision, at most, was based upon the assumption that it was foreseeable that if they did not require the Commissioner to act more forceably, the Buffalo school system would remain segregated. Assuming this was the assumption with respect to the Board of Regents, there exists no evidence in the record in support thereof. In any event, inaction by the Commissioner or the Regents in the instant case is no more probative of segregative intent than were the affirmative acts by school officials in assigning students in Austin as to which segregation was a foreseeable result.

Significantly, this court stated in Hart v. Community School Board, supra:

"We assume that mere inaction, without any affirmative action by the school authorities, allowing a racially imbalanced school to continue, would amount only to de facto rather than de jure segregation." (512 F.2d at p. 48).

In the instant case, the court below adopted a curious "good samaritan" variation of the above quoted statement from Hart:

"It may be, as the Regents and the Commissioner urge, that when state officials have been completely unininvolved with a school district, they should not be held liable for segregation that exists in that school district. But here, the Regents and the Commissioner asserted their authority over the B.P.S.S. and demanded action." (Dec. March 1, 1977, App. 1324-25).

The implication of the district court's statement is that if the Commissioner and Regents had simply turned their backs on the Buffalo school problem and had made no effort to remedy the situation, there would be no basis for a finding of invidious segregative intent. However, according to the district court's reasoning, once the Regents issued their policy statements and the Commissioner made attempts to require the Buffalo school board to integrate the schools, the invidious segregative motive must be inferred because of the failure of those efforts. It is respectfully submitted that a determination of segregative intent cannot turn on the distinction suggested by the district court.

If the district court's holding were to be sustained, educational officials of any state whose policy, like that of New York, is to eliminate segregation, would be guilty of segregative practices if their attempts to require local school officials to comply with state policy were unsuccessful. It is submitted that the U.S. Constitution does not mandate any such absolute obligation.

Under any reasonable view, the standard of intent adopted by the court below is inconsistent with the decisions of the U.S. Supreme Court. Accordingly, the conclusion that the Board of Regents violated plaintiffs' constitutional rights should be reversed.

POINT II

Under Any Permissible Standard neither the Findings of the District Court nor the Trial Evidence Can Support a Determination of Invidious Segregative Motive on the part of the Board of Regents

The teaching of Davis, Austin and Arlington is that to find a constitutional violation there must be an actual intent to segregate. The fact that an action or inaction on the part of the defendant has a segregative result, or that a segregative result was foreseeable, does not in and of itself prove an invidious intent. The plaintiffs' burden is greater. The search is for motive - to demonstrate why the defendant acted or failed to act.

A comparison of the facts in Washington v. Davis, Austin and Arlington with the findings and evidence of the instant case demonstrates that plaintiffs have failed to meet their burden of proving that the Board of Regents acted or failed to act because of an actual segregative intent.

The court below summarized the efforts made by the Commissioner of Education to desegregate the Buffalo schools in its opinion. 415 F.Supp. 949-958. The court noted the Regents' integration policy statements, beginning in 1960 and the guidelines for desegregation promulgated by the State

Education Department in 1963. The court reviewed the history of the Yerby Dixon proceeding pursuant to which, in 1965, the Commissioner ordered Buffalo education officials to prepare a plan to desegregate the schools. In that year, the Commissioner set up an Advisory Committee to assist the Department of Education with respect to desegregation problems.

In 1966, after reviewing the City's desegregation plan, the Commissioner ordered a revised plan for Buffalo. A revised plan was forthcoming from the City, but was found unsatisfactory by the Commissioner who thereupon ordered another plan to be prepared. In 1968, a new plan was submitted by the Buffalo school board, but implementation by the City was unsatisfactory. Between 1969 and 1972, attempts were made by the Commissioner to obtain movement by Buffalo school officials to integrate the schools. In 1972, the Commissioner sent a task force to Buffalo for the purpose of preparing a state integration plan for the City. The plan was promulgated, but rejected by City officials. By the time of trial, the Commissioner had prepared a Show Cause Order which provided for a full scale desegregation plan with respect to the Buffalo school system.

These efforts by the Commissioner of Education, albeit unsuccessful, cannot be deemed evidence of segregative intent on the part of the Commissioner. Indeed, the evidence

at trial demonstrated that there were only two sanctions available to the Commissioner in the event the Buffalo school officials failed to comply with whatever order the Commissioner would have issued following hearings on his proposed show cause order. Those sanctions were removal of the City Board of Education and the withholding of State aid. At trial, the court agreed that such actions would be "drastic". (App. 811). As a result, the Commissioner used a middle ground in an attempt to obtain desegregation by the Buffalo school officials. This consisted of persuasion, providing technical assistance, the development of a State plan and the other activities by the State Department of Education, as described above.

The court below made no finding which could support the inference it drew of segregative intent, other than its assumption that the Commissioner should have taken more decisive action to require integration in Buffalo. In view of the policy of the Board of Regents to eliminate both de facto and de jure segregation from the schools of New York State and the affirmative efforts by the Commissioner of Education to integrate the Buffalo school system, there exists no basis for the Court's holding that the Board of Regents or its individual members violated plaintiffs' Constitutional rights.

In Washington v. Davis, the Supreme Court found that

the affirmative efforts of the Metropolitan Police Department to recruit black officers and to change the racial composition of the police force negated any inference that the Department discriminated on the basis of race. In the instant case, the Regents' policy to eliminate segregation and the affirmative efforts of the New York State Department of Education to integrate the Buffalo schools and to supply staff members to devise and implement a desegregation plan negates any inference of a discriminatory intent on the part of the Board of Regents and its members.

In Austin, the Supreme Court remanded the decision of the Circuit Court which held that a discriminatory intent was proven by reason of the fact that it was foreseeable by school officials that their affirmative acts in adopting a neighborhood school assignment policy would result in school segregation. A fortiori, in the instant case, where the Board of Regents and the Commissioner of Education made affirmative efforts to require and persuade the Buffalo Board of Education to desegregate the schools, a finding of segregative intent is unwarranted simply because those efforts failed, and more drastic relief was not sought by the Commissioner.

Under the approach taken by the United States Supreme Court in Arlington, the failure of the Village to rezone, even though it was foreseeable under the facts of that case that its

inaction would result in continued housing segregation, was not a sufficient basis upon which to predicate a finding of segregative intent. A fortiori, in the instant case where the Board of Regents and the Commissioner of Education had taken affirmative steps to attempt to change the picture in Buffalo, the failure of their efforts cannot be deemed to constitute a segregative intent or purpose under Arlington.

In Arlington, the Supreme Court cited certain factors which may be considered in determining whether invidious discrimination was a motivating factor, noting that the impact of an official action is considered, at most, a starting point, unless there emerges a stark pattern, "...unexplainable on grounds other than race [which] emerges from the effect of the State action even when the governing legislation appears neutral on its face." (45 U.S.L.W. 4077). In this connection, the Supreme Court noted that impact alone is not determinative unless the pattern is stark as that in Gomillion v. Lightfoot, 364 U.S. 339 (1960), or Yick Wo v. Hopkins, 118 U.S. 356 (1886).

The facts of the instant case with respect to the State defendants can in no manner be equated to the acts of discrimination found in Gomillion or Yick Wo. In Gomillion, the defendants redrew city lines to remove all but four or five negroes out of 400 from the voting population, while not

removing a single white voter. In Yick Wo, the defendant applied a City ordinance in a manner which prohibited 200 Chinese from operating laundries, while, at the same time, permitting 80 others, not Chinese, to operate the same business under similar circumstances.

Since the instant case does not involve such a stark pattern, the court must look to other evidence in determining segregative intent. In Arlington, the Supreme Court noted the following factors, not intended to be exhaustive, which could be considered in determining whether or not there existed a segregative purpose.

1. The historical background of the official decision, particularly if it reveals a series of official actions taken for invidious purposes. As examples, the Court cited Lane v. Wilson, 307 U.S. 268 (1939); Griffin v. County School Board, 377 U.S. 218 (1964); Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala.), aff'd per curiam, 336 U.S. 933 (1949).

In Lane, a grandfather clause exception to a literacy voting test had been declared unconstitutional by the United States Supreme Court in 1915. New registration prerequisites were passed in 1916 which provided that those voting in the 1914 election (whites) remained qualified to

vote for life. Others had only a 12-day period to register. The Supreme Court held that the new restrictions were unconstitutional in the context of the prior invalidation of the grandfather exception.

In Griffin, following, and in response to the issuance of a court desegregation order, schools were ordered closed by the State defendant and contributions were made by the State to private segregated schools to accommodate children from the closed public schools. The Supreme Court held such actions unconstitutional.

In Davis, voting laws were amended to require that applicants for registration understand and explain provisions of the United States Constitution. The Supreme Court held that the requirements were promulgated in an attempt to evade the consequences of a prior Supreme Court decision prohibiting exclusion of negroes from voting by restricting party membership to white voters.

The historical background factor and the examples cited by the court in Arlington are inapplicable to the instant case. There exists no prior history of official actions taken for invidious purposes by the Board of Regents. On the contrary, the Regents' consistent policy was, and is, to eliminate segregation from all public schools in New York State. As the

court found, the Commissioner of Education did make efforts to implement the Regents' policy with respect to Buffalo, and as the evidence reveals, certain of the Regents attempted, in their unofficial capacities, to convince the Buffalo Board of Education that efforts should be made to integrate the schools. (App. 783-4, 281-5). In any event, the record is devoid of any evidence which could reveal "...a series of official actions taken for invidious purposes" by the Regents of the Commissioner of Education.

2. The specific sequence of events leading up to the challenged decision, which might reveal the purpose of the decision maker. In this connection, the Supreme Court cited instances where zoning was changed in order to frustrate proposed integration housing plans which would have been proper under pre-existing zoning. Other examples cited by the court were Reitman v. Mulkey, 387 U.S. 369 (1967), and Grosjean v. American Express, 297 U.S. 233 (1936). In Reitman, a law was passed which not only repealed the State's prior anti-discrimination statutes, but affirmatively permitted discrimination. In Grosjean, there existed a history by State officials of hostility against the press, and a license tax was then imposed on certain newspapers. As a result, the Supreme Court held that the tax violated freedom of the press.

In the instant case, there existed no analogous sequence of events which one could look to in determining

segregative intent on the part of the Regents. On the contrary, beginning in 1960, and consistently thereafter, the policy expressed by the Board of Regents was even stronger than that expressed by the United States Supreme Court, since the Regents declared that both de facto and de jure segregation should be eliminated from the schools.

3. Substantive departures from practice, particularly if factors usually considered important by the decision maker strongly favor a decision contrary to the one reached.
There was no finding, nor is there any evidence in the record, of any substantive departure by the Regents (or by the Commissioner) from their traditional practice with regard to school segregation. The Board's policy statements have been consistently and strongly in support of an integrated school system. In fact, as testified by Regent Clark, the Board reaffirmed its position on integration in its 1972 policy statement even in the face of a challenge by the then Governor on the question of busing (App. 897-8).

4. The legislative or administrative history, especially where there exist contemporary statements by members of the decision making body, minutes of its meetings, or records. In this connection, the Supreme Court noted that only in extraordinary circumstances should the members of the decision making body be called to testify at trial concerning the purpose of an official action.

There is not a scintilla of evidence in the record of any statement by any member of the Board of Regents, or by the Commissioner of Education, which would show racial bias or motive by any of them. The best evidence of purpose insofar as the Board of Regents is concerned is found in their official records consisting of written policy statements.* All of such records before the court negative the proposition that the Board of Regents acted, or omitted to act, because of an invidious segregative purpose.

In summary, none of the factors cited by the court in Arlington, nor the consideration of any other conceivable factor, could lead to a determination of segregative intent with respect to the Board of Regents. The evidence is overwhelmingly to the contrary. The decision should be reversed.

* As then Chancellor McGovern testified, a Journal is maintained, reporting all official actions taken by the Board of Regents (App. 979). All policy statements before the Court with respect to integration, including those submitted on the motion of the individual Regents for reargument nullify any notion of segregative intent by the Board or its individual members. In this connection the Court is respectfully referred to integration policy statements issued by the Regents subsequent to trial and which were before the court below on the reargument motion. (App. 1235-83).

POINT III

The Decision of the District Court Constitutes a Departure from Principles of Federalism Militating against Federal Court Interference with State Agencies and Officials

It is undisputed that the Board of Regents is responsible for setting policy for the school system of New York State. It is further undisputed, and the Court so found, that the Regents' long standing written policy is that both de facto and de jure segregation should be eliminated from the schools of New York State. (PX 28). Indeed, the New York State Court of Appeals has held that under the authority of §207 of the Education Law, the Board of Regents has declared racially imbalanced schools to be racially inadequate. Matter of Vetere v. Allen, 15 N.Y. 2d 259 (1965).

The District Court found no affirmative act committed by the Regents which led to segregation in the Buffalo school system. Indeed, the Court below summarized the efforts of the Commissioner of Education, beginning

in 1965, to require Buffalo to comply with Regents' policy.

Under the circumstances, it is respectfully submitted that the finding of a Constitutional violation on the part of the Board of Regents and its members and the order requiring the Regents to participate in the preparation and implementation of a remedy, constitutes an unwarranted and prohibited interference by the Federal Court with the affairs of State officials and agencies.

In Rizzo v. Goode, 46 L. Ed. 2d 561 (1976), citizens of the City of Philadelphia brought a suit under 42 USCS 1983 against the Mayor of Philadelphia, the City's Managing Director, and supervisory police officials seeking equitable relief as a result of an alleged pervasive pattern of police mistreatment of minority citizens.

The District Court issued equitable relief ordering defendants to prepare a program to be implemented to correct the pattern of police mistreatment, holding that such relief was appropriate because the defendant city officials had failed to affirmatively act in the face of the misconduct alleged.

The Circuit Court of Appeals affirmed the District Court's decision. 506 F.2d 542 (1974). The United States Supreme Court reversed, holding that the District Court's decision constituted an unwarranted intrusion by the federal judiciary into the discretionary authority committed to the defendant city officials by state and local law to perform their official functions. The Supreme Court held that the District Court's decision was a departure from principles of federalism militating against federal court interference with state officials and agencies.

In so holding, the Supreme Court noted that there was no finding by the District Court of any policy on the part of the named defendants to violate the legal and constitutional rights of the plaintiffs, and that there was no affirmative link between the incidents of police misconduct and the adoption of any plan or policy by the defendants showing their authorization or approval of such misconduct.

In the instant case, the District Court made no finding of any policy on the part of the Regents to violate the constitutional rights of the plaintiffs. On the contrary, the Court cited the efforts of the Department of Education to correct racial imbalance in the Buffalo schools and the Regents' policy that de facto and de jure segregation should be eliminated from the New York State school system.

As in Rizzo, there was no affirmative link between segregation in the Buffalo school system and the adoption of any plan or policy by the Regents which would show their authorization or approval of alleged misconduct by the Buffalo city officials. Indeed, assuming arguendo, that the acts of the Commissioner of Education could be deemed to be the acts of the Board of Regents, the record is clear that the Commissioner did attempt to require the Buffalo city officials to remedy the racial imbalance in the Buffalo school system.

In Rizzo, the court rejected the plaintiff's argument that under 42 USC 1983, defendants had a duty, as supervisors, to eliminate Constitutional violations by police officers, a duty as to which defendants had allegedly defaulted.

"Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.' 120, 96 L Ed 138, 72 S. Ct. 118 (1951), quoted in O'Shea v. Littleton, *supra*, at 500, 38 L Ed. 2d 674, 94 S. Ct. 669."

* * * *

"When the frame of reference moves from a unitary court system, governed by the principles just stated, to a system of federal courts representing the Nation, subsisting side by side with 50 state judicial, legislative and executive branches, appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief. Doran v. Salem Inn, Inc., 422 U.S. 922, 928, 45 L. Ed. 2d 648, 95 S. Ct. 2561 (1975)." (46 L. Ed. 2d 573)

As recognized by the separate dissenting opinion of Mr. Justice Blackmun, the majority opinion holds that a state official is not subject to the strictures of 42 U.S.C. §1983 unless he directs the deprivation of constitutional rights. There was no such finding nor evidence in the instant case.

Significantly, the majority opinion in Rizzo distinguished that case from the facts of desegregation cases such as Swann v. Charlotte-Mecklenburg Board of Education and Brown v. Board of Education:

"Those against whom injunctive relief was directed in cases such as Swann and Brown were not administrators and school board members who had in their employ a small number of individuals, which latter on their own deprived black students of their constitutional rights to a unitary school system. They were administrators and school board members who were found by their own conduct in the administration of the school system to have denied those rights." (46 L. Ed. 2d 573).

The distinction is equally applicable here. Neither the Regents nor the Commissioner affirmatively violated plaintiffs' constitutional

rights. Rather, the district court erroneously assumed that the state officials were constitutionally obligated to correct segregation in Buffalo--a condition they did not create. The only officials who were found to have committed such affirmative acts were the city defendants.

As in Rizzo, the instant case presented no occasion for the district court to hold the Board of Regents responsible for constitutional violations by others or to order the Board of Regents to participate in the remedy.

POINT IVThe Regents Committed No Omissions
with Respect to School Segregation

Implicit in the Court's decision is the conclusion that the Regents had the power to act in a more affirmative manner than they did to eliminate segregation in the Buffalo school system. It is respectfully submitted that the Court's decision fails to reflect either the degree to which the Regents have acted to eliminate school segregation or the limitation on their power to implement their consistent policy that both *de jure* and *de facto* segregation should be eliminated from the schools.

In written statements, issued since 1960, the Regents have announced their policy that segregation in the New York State public schools be eliminated, and they have set forth appropriate methods to be adopted by education officials to achieve school desegregation. The policy of the Board of Regents was noted by the New York Court of Appeals in Matter of Vetere v. Allen, 15 N.Y. 2d 259, 267 (1965):

"here, the Board of Regents under authority of §207 of the Education Law has declared racially imbalanced schools to be educationally inadequate."

Acting under the constraints to their power conferred upon them by the legislature, neither the Board of

Regents nor its members, can be said to have participated in any Constitutional violations, either by act or omission. As noted in Vetere v. Allen, supra, the Regents are empowered to make policy, but it is the obligation of the Commissioner of Education to implement that policy.* Under the structure of the Education Law, the Board of Regents is powerless to overturn or modify such actions and decisions the Commissioner may take in implementing Regents' policy. In dealing with racial segregation, the Commissioner acts pursuant to the judicial powers conferred upon him under Education Law, §310, which provides in pertinent part:

" . . . and his decision in such appeals, petitions and proceedings shall be final and conclusive and not subject to question or review in any place or court whatever".

Thus, under existing law, there is no appeal from decisions of the Commissioner to the Board of Regents, nor are the Regents empowered in any other way to overturn or modify the manner in which the Commissioner acts upon, fails to act upon, or interprets Regents' policy. Insofar

* It is not the intention of appellants herein to state or imply any failure on the part of the Office of the Commissioner of Education to take steps to eliminate segregation in Buffalo or elsewhere. We simply urge the Court to consider, as a matter of fact and law, that the Regents have not committed any act or omission constituting a violation of Constitutional rights with respect to the Buffalo School system.

as integration is concerned, the Regents may only make policy. This they have done and their clear and consistent mandate to all public school officials has been that the schools of New York shall be desegregated.

In summary, the Regents have done all that has been within their legislative grant of power to do in remedying racial segregation within the New York State school system. The Regents have rendered it clear through policy statements issued over the years that racial segregation is to be eliminated within the schools. They have furnished guidance to the Commissioner of Education and all public school officials within the State as to the means which may be adopted to implement this policy. It cannot be said that the Regents made Constitutional omissions.

POINT V

Intent to Segregate cannot be Imputed
to Officials Elected Subsequent to
the Acts or Omissions Alleged

In Point VI below, we discuss the propriety of joining appellants herein as parties-defendant following the conclusion of the trial, which effectively denied them their day in court. The individual members of the Regents began their respective terms in office at various times. Only one Regent-Appellant herein was elected prior to the filing of the complaint. Four others were elected prior to trial, and three assumed office after the trial concluded. Assuming arguendo, that some Regents condoned the existence of segregation in the past, there must be a finding that Regents elected subsequent to the commission of the alleged acts will continue the practices of their predecessors.

Mayor v. Educational Equality League, 415 U.S. 605 (1974).

No such finding could or should be made in the instant proceeding without affording individual Regents the right to give testimony and to otherwise fully participate in the trial proceedings.

POINT VIAppellants Have Been Denied Due Process by
Reason of a Finding of Liability without
the Benefit of an Opportunity to Defend

Plaintiffs' motion to add individual Regents was made over a year subsequent to the conclusion of the trial and was granted on April 30, 1976, the same day as the Court rendered its decision on the substantive issues of the lawsuit. No service of process has been made on the appellants to date.

It is respectfully submitted that fundamental principles of equity and fairness preclude the involuntary adding or joinder of persons as defendants in a lawsuit following the conclusion of the trial thereof, without the opportunity to reopen the proceedings. Research has revealed no case in which a defendant has been so joined.

As stated by the United States Supreme Court In re Oliver, 333 U.S. 257, 273 (1947):

"A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense - a right to his day in court - are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witness against him, to offer testimony, and to be represented by counsel."

Mullaney v. Anderson, 342 U.S. 415 (1952), was cited by the District Court to support its decision of April 30, 1976, permitting the addition of the individual Regents as

parties (App. 1028). There, the parties added were plaintiffs, and not defendants. The United States Supreme Court stated: "Rule 21 will rarely come into play at this stage of the proceeding. We grant the motion in view of the special circumstances before us." (supra, p. 417)

In Ingraham v. Wright, 498 F.2d 248 (5th Cir. 1974), cited by the Court below in its decision, the Circuit Court of Appeals reversed the trial court's directed verdict following the conclusion on the plaintiff's case. In suggesting that the District Court, on remand, should grant the likely request of plaintiffs to add individual members of the school board as parties-defendant, the Court recognized that ". . . the defendants, must, of course, be afforded an opportunity to offer evidence . . ." (supra, p. 265)

While in the instant case, the Court below stated in its decision that counsel for the City and State defendants indicated that no new offer of evidence would be forthcoming if plaintiffs' motion to amend were to be granted, such a stipulation could not bind appellants herein. The individual Regents were not parties to this case at the time of the motion nor were they represented by counsel. The individual appellants have never had their day in court. As stated by Regent Genrich in his affidavit in support of the motion of individual Regents for reargument, since he was not named as a defendant to this action until after trial, and was not represented by counsel,

he was not aware of the personal implications of the charges which ultimately branded him as a participant in intentional acts of segregation. Had he and other Regents been named as defendants, they would have given evidence and been permitted the opportunity through counsel to cross-examine and negate the charges of segregative acts and omissions (App. 1284-5).

In cases in which the issue of joinder has been determined under FRCP 15, 19 or 21, the courts have stressed that the added parties should have the opportunity to defend against the charges set forth in the complaint. Even where joinder has been requested prior to trial, the courts have refused to add parties-defendants. In Barr Rubber Products Co. v. Sun Rubber Co., 425 F.2d 1114 (2d Cir. 1970), cert. denied 400 U.S. 878 (1971), the court refused to order the joinder to two defendants under FRCP 20. The Circuit Court of Appeals held that the trial court's refusal to join the defendants was not an abuse of discretion where such joinder was sought prior to the completion of pretrial discovery which had already been extensive.

In Fair Housing Development Fund Corp. v. Burke, 55, F.R.D. 414 (E.D.N.Y. 1972), the plaintiff purportedly represented a class of economically disadvantaged black persons who challenged the constitutionality of certain zoning ordinances of the Town of Oyster Bay. The court denied plaintiff's motion under FRCP 21 to add twelve adjacent villages as defendants during the pretrial discovery proceedings. The

court noted the prejudice which would result to the villages which had not participated thus far in the pretrial proceedings.

In Hargrove v. Louisville and Nashville Railroad, 153 F.Supp. 681 (W.D. Ky. 1957), plaintiffs' motion to add a party defendant under FRCP 21 was denied prior to trial, where the case was pending for two years.

In Blakely v. Lisac, 357 F.Supp. 367 (D. Oregon 1973), the Court denied a motion to add parties plaintiff pursuant to FRCP 21 following a favorable decision to the named plaintiff on the issue of liability. Although the Court referred to the decision of the United States Supreme Court in Mullaney v. Anderson, supra, the Court held that plaintiffs' motion was untimely.

In Rayfield v. Watson, 268 F.Supp. 97 (E.D.N.C. 1967), the Court denied plaintiff's motion to add a trial witness as an additional defendant during the course of a trial under FRCP 20 holding that the granting of such a motion would introduce new issues and delay the Court's decision.

In those cases where motions to add parties have been granted in the late pretrial stage, or during the course of the trial, the courts have uniformly granted the defendants additional time to introduce such evidence as the amendment may make pertinent. In Boles v. Greenville

Housing Authority, 468 F.2d 476 (6th Cir. 1972), the plaintiff sought declaratory and injunctive relief concerning a partially completed Urban Renewal Project. The single defendant was the Greenville Housing Authority. The HUD, which participated in the project, was not joined as a defendant. After an evidentiary hearing, the Court held for the defendant Housing Authority, and that decision was appealed. The Circuit Court of Appeals did not determine the merits of the case but found that HUD was an indispensable party and dismissed the appeal without prejudice to the appellants to join HUD as a defendant in the District Court. In a footnote to the Court of Appeals' decision, at p. 480, supra, the Court stated:

"It is permissible to join HUD as a defendant at any stage of the litigation in the trial so long as it is given sufficient notice and opportunity adequately to defend its interest." (Emphasis added)

In Oppenheimer Mendez v. Acevedo, 512 F.2d 1373 (5th Cir. 1975), a suit was brought against individuals. The Court granted plaintiffs' motion to sue the same individuals in their capacity as public officials. However, the Court granted the defendants additional time to bring forth new evidence in the trial which the amendment may make pertinent.

In those proceedings in which courts have added parties-defendant, the added parties have been held entitled

to receive service of process. See 3A Moore's Federal Practice, §21.05(1); Hoffman v. Santly-Joy, 51 F. Supp. 799 (S.D.N.Y. 1943). In Goodrich v. England, 262 F. 2d 298 (9th Cir. 1958), in discussing the permissibility of amending a complaint to correct an error in the designation of the defendant, the Court stated as one of its considerations:

"....was a party resisting amendment sufficiently apprised of the pendency of the action and adequately served with process." (supra, p. 301) (emphasis added)

POINT VIIAn Interdistrict Remedy is Impermissible

The district court's orders with respect to the remedy requires the State defendants to devise and implement a desegregation plan which would encompass the entire Buffalo metropolitan area, in addition to the City of Buffalo itself. That part of the court's order contravenes the decision of the United States Supreme Court in Milliken v. Bradley, 418 U.S. 717 (1974).

In its order of April 30, 1976, the court specifically acknowledged that there was no basis in the record to order a metropolitan-wide remedy in light of Milliken v. Bradley, supra. Nevertheless, the court in effect ordered the State defendants to devise and implement such an order. In this connection, the Court stated:

"On the present state of the record, there does not appear to be any basis for the court to order a metropolitan-wide remedy. However, it should be noted that Milliken does not prevent the State from devising and implementing a metro response to what is essentially a metropolitan problem. Nor does Milliken prevent a plan that would encompass the metropolitan areas on a voluntary basis, and the State defendants shall consider this in their plan." (App. 1193).

In its order of July 9, 1976, with respect to the first stage of the remedy, the court provided at page 67 hereof:

"In addition to the obligations imposed on the State defendants, they are directed to come forth on October 15 with a detailed scheme of involving the suburban schools in the participation with the plan. In the intervening period, the Commissioner and his representatives are directed to meet with suburban school leaders to determine what school resources, staff, BOCES use or other school facilities may be used on a voluntary or other basis in order to assist in the integration effort in the Buffalo Schools." (App. 1286A) (emphasis added)

In Milliken v. Bradley, the Supreme Court held:

"Disparate treatment of White and Negro students occurred within the Detroit school system, and not elsewhere, and on this record, the remedy must be limited to that system." (41. L. Ed. 2d 1092)

The Court's orders of April 30, 1976 and July 9, 1976, it is submitted, constitute an impermissible contravention by indirection of Milliken v. Bradley, where the Supreme Court stated:

"To approve the remedy ordered by the court would impose on the outlying district, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted in Brown I and II or any holding of this court." (41 L. Ed. 2d 1091-2)

CONCLUSION

It is respectfully submitted that the trial record fails to establish that plaintiffs have sustained their burden of proving that members of the Board of Regents or the Commissioner of Education have acted or omitted to act by reason of an invidious segregative intent. The two decisions of the court below dated April 30, 1976 and the court's decision of March 1, 1977 on reargument should be reversed with costs with respect to the Board of Regents and its individual members and the amended complaint should be dismissed as to them.

In the alternative, in the event this court determines that the trial record, as it now stands, would support the conclusion that appellants herein have denied plaintiffs of their constitutional rights, the matter should be remanded with directions that the trial be reopened in order to permit appellants to give proof and cross-examine witnesses. At this juncture, appellants herein have not had their day in court and have thus far been denied due process.

Dated: March 30, 1977

Respectfully submitted,

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